Supreme Court, U.S.
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No. 90-1817

In The

Supreme Court of the United States

October Term, 1990

TENNECO RESINS, INC.,

Petitioner,

v.

ROBERT J. BOYER, individually and as Executor of the ESTATE OF MARSHA F. BOYER, deceased,

Respondent.

Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DATED: June 27, 1991

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QUESTIONS PRESENTED

1. Does the Due Process Clause permit the forum-related contacts of a predecessor corporation to be attributed to its non-resident successor corporation for the purposes of establishing *in personam* jurisdiction where:

(a) the successor derived financial benefit from its predecessor's forum related activity;

(b) the cause of action arises from the forum related activity of the predecessor;

(c) the liability for the injury caused by the predecessor's forum related activity has been voluntarily assumed by the successor;

(d) the successor knew or should have known that the predecessor's injury producing activity occurred in the forum state; and

(e) the predecessor and successor knew or should have known of the dangers associated with the forum-related activity.

2. Whether this Court should issue a writ of certiorari to the Pennsylvania Superior Court with reference to the Full Faith and Credit Clause issue presented where Petitioner did not press, and the Superior Court did not pass upon, the issue.

3. Does the Full Faith and Credit Clause of the United States Constitution prevent application of Pennsylvania successor liability law to treat as a *de facto*

QUESTIONS PRESENTED – Continued

merger a transaction between Delaware corporations allegedly executed in accordance with Delaware's sale-of-assets statute where:

(a) current Delaware substantive law would define the transaction as a *de facto* merger; and

(b) no judicial or statutory authority exists to support application of the Full Faith and Credit Clause to the factual context of this matter.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioner Tenneco Resins, Inc. and the respondents Robert J. Boyer, Sherrie Simmers, Robert A. Simmers, Robert S. Simmers (a minor by his parents and natural guardians Sherrie and Robert Simmers), Children's Hospital of Philadelphia, American Cyanamid Company, Tennessee Gas Pipeline Company (formally known as Tenneco, Inc.), Chromalloy Pharmaceutical, Inc., Forrest Pharmaceutical Laboratories, Inc., Chromalloy American Corporation, Eugene B. Spitz, M.D., C. Everett Koop, M.D., Heyden Products Inc., Fellows Medical Manufacturing Company, Inc., Radiology Dept. of Children's Hospital of Philadelphia, Rovena Spencer, M.D., and Joseph Stokes, Jr., M.D.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert J. Boyer ("Boyer") respectfully opposes Petitioner's writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Pennsylvania Superior Court is reported at 394 Pa. Super. 464, 576 A.2d 376 (1990) and is reprinted in Petitioner's Appendix ("Pet. App.") at A-1-27. The order of the Supreme Court of Pennsylvania denying the petition for allocatur is reprinted at Pet. App.

A-29-30. The order of the Pennsylvania Court of Common Pleas denying Petitioner's challenge to jurisdiction and certifying this issue for appeal is reprinted at Pet. App. A-33 and Pet. App. A-35 respectively.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the United States Constitution involved are the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1, and the Full Faith and Credit Clause, U.S. Const. art. IV, § 1 and are set forth in Petitioner's Brief at p. 2.

The Pennsylvania Statutes involved, 42 Pa. Cons. Stat. Ann. §§ 5301 and 5322, are set forth at Pet. App. A-36-40.

The Delaware Statutes involved, Del. Code Ann. tit. 8 §§ 251 and 271, are set forth at Pet. App. A-41-46.

STATEMENT OF THE CASE

Respondent, Robert J. Boyer, individually and as Executor of the Estate of Marsha F. Boyer, deceased, filed this wrongful death and survival action against Petitioner Tenneco Resins, Inc., among other defendants. The action

arises from the 1949 administration of a highly dangerous x-ray contrast medium, Thorotrast, to his wife, Marsha F. Boyer. Marsha Boyer died on April 26, 1986 from a cancer related illness caused by the 1949 Thorotrast injection.

Respondent hereby adopts the recitation and application of facts set forth in the Pennsylvania Superior Court opinion, *Simmers v. American Cyanamid Co., et al.* Pet. App. at A-1-27. Petitioner inaccurately represents to this Court that the Pennsylvania Superior Court allowed the exercise of personal jurisdiction over it "merely" because the substantive law of the forum "may impose liability" upon Petitioner; therefore, Respondent raises the following points relevant to the constitutional issue presented.

First, the Pennsylvania Superior Court specifically found that, by the late 1940s, scientific literature warned of the medical risk to humans inherent in the use of Thorotrast, specifically warning of the increased risk of cancer; and, that Petitioner, and Petitioner's predecessor, knew or should have known of the dangers. Pet. App. at A-2-3, A-19, A-25-26.

Furthermore, the Superior Court found that Petitioner derived financial benefit from its predecessor corporation's Thorotrast related commercial activity in the forum state; and, that Petitioner had voluntarily assumed its predecessor's liabilities and had become the corporate embodiment of its predecessor. Pet. App. at A-25, A-19, A-17.

Finally, the Superior Court found that the due process analysis relevant to the issue of personal jurisdiction, and the requisite determination of fairness, cannot operate in a vacuum divorced from the law of successor

liability because the result would be absurd under the facts of this case. Pet. App. A-11-16, A-25.

REASONS FOR DENYING WRIT

A writ of certiorari should be denied because the Pennsylvania Superior Court's decision is in accordance with the fundamental requirements of due process as set forth by this Court with reference to the assertion of personal jurisdiction over a non-resident defendant. Moreover, the Superior Court decision does not conflict with or create confusion among the decisions of the Federal Courts of Appeals. A writ of certiorari should be denied because Petitioner did not press, and the Pennsylvania Superior Court did not decide or pass upon, the Full Faith and Credit Clause issue presented here. Further, Delaware substantive law is in accord with the Pennsylvania Superior Court's treatment of the underlying legal issue.

I. The Pennsylvania Superior Court Decision Allowing the Exercise of Personal Jurisdiction Over Petitioner is in Accordance with the Fundamental Requirements of Due Process as Set Forth by this Court.

Petitioner asks this Court to review the decision below because the Pennsylvania Superior Court did not perform its jurisdictional analysis in a vacuum. Indeed, the Superior Court acknowledged the analytic similarity between substantive liability and personal jurisdiction with reference to successor corporations. The Superior Court did not, as Petitioner suggests, focus *entirely* on the

contacts of Petitioner's predecessor. Rather, the Superior Court focused upon the due process requirement of fairness to the non-resident corporation, finding certain analogies between the law of jurisdiction and the law of successor liability useful to determine whether the exercise of personal jurisdictional over a non-resident successor corporation comports with the fundamental requirements of due process. The Superior Court quoted with approval Judge Caleb Wright's opinion in *Fehl v. S.W.C. Corp.*, 433 F.Supp 939, 945 (D. Del. 1977), which states:

> Certain principles of the substantive law with respect to the assumption by successor corporations of products liability are relevant to this jurisdictional question . . . Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business within the state [i.e. assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business. . . . . The rationale of the substantive liability cases . . . is *equally applicable* to the problem of personal jurisdiction.

Pet. App. at A-15 [citations omitted, emphasis in original].

Crucial to the Superior Court's decision was the fact that Petitioner derived financial benefit from its predecessor's Thorotrast-related business in the forum, the fact that the liabilities relating to the product were voluntarily assumed, and the fact that Petitioner knew or should have known the possible extent of any liabilities flowing from the product line and where those liabilities may exist. The Superior Court concluded that "the traditional

'notions of fair play and substantial justice' central to the assertion of jurisdiction are in fact furthered by [this] decision". Pet. App. at A-26. The court specifically rejected the wooden approach to jurisdictional inquiry which Petitioner advances here. "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles". Pet. App. at A-20 *citing, Duris v. Erato Shipping,* 684 F.2d 352, 356 (6th Cir. 1982), *aff'd sub nom., Pallas Shipping Agency, Ltd. v. Duris,* 461 U.S. 529 (1983).

The Pennsylvania Superior Court noted that the standards set forth in *Burger King v. Rudzewicz,* 471 U.S. 462, 474 (1985) are satisfied here because Petitioner's conduct and connection with the forum state were such that Petitioner could reasonably anticipate being haled into Court there. Pet. App. at A-25-26. The court's decision thus falls squarely within the reasoning of this Court with reference to the issue of fairness:

> [w]here [defendants] purposely derive benefit from interstate activities it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; *the due process clause may not readily be welded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.* And because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually would not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 473-474 [citations omitted; emphasis supplied].

In each case before this Court where due process issues were raised as a result of the exercise of personal jurisdiction over a non-resident defendant, the benefits derived by the non-resident defendant from the forum related activity have been analyzed to determine whether the exercise of personal jurisdiction withstands due process analysis. *Accord, World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 299 (1980) (financial benefit to defendant from attenuated or collateral relation to the forum will not support jurisdiction if benefits do not stem from a constitutionally cognizable contact with the forum); *Burger King,* 471 U.S. at 479-480 (jurisdiction proper where non-resident deliberately reached out and negotiated with Florida corporation for the purchase of a long term franchise and the benefits that would derive from affiliation with a nationwide organization); *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 112-113 (1987) (mere awareness or foreseeability as the basis for the exercise of personal jurisdiction exceeds the limits of Due Process Clause); *Kulko v. Superior Court,* 436 U.S. 84, 95, *reh'g denied* 438 U.S. 908 (1978) (jurisdiction improper where financial benefit to non-resident resulted not from activity in forum state but from child's absence from defendant's home state).

As set forth above, the Superior Court analyzed the due process issue presented in accordance with the standards set forth by this Court. Petitioner attempts to distract this Court from the analysis embodied in the Superior Court's decision by arguing that the decision improperly based jurisdiction on a *contract* unrelated to the forum. Petitioner cites *Rush v. Savchuk,* 444 U.S. 320 (1980), in support of its contention. However, this Court's

decision in *Rush* is inapposite and lends absolutely no support to Petitioner's argument.

In *Rush*, no nexus existed between the forum, the injury and the contacts of the defendant. Moreover, the non-resident defendant derived no financial benefit from the forum contact. Here, Petitioner derived financial benefit from the forum-related contacts of its corporate predecessor and the injury arises from the predecessor's activity in the forum. Thus, the 1963 Agreement whereby Petitioner assumed the liabilities for the actions of its predecessor, need not demonstrate sufficient ties to the forum because the contract implicitly provided for the assumption of liabilities wherever they accrue. Pet App. at A-17. The contractual assumption of liabilities would lose legal force if, as Petitioner suggests, the Due Process Clause required *any* contract assuming liabilities be a contract with sufficient ties to the forum for purposes of exercising *in personam* jurisdiction over the entity which assumed the liabilities. Accordingly, the Superior Court's interpretation of the 1963 Agreement, for purposes of analyzing the successor liability and jurisdictional issues presented, does not require an examination of the Agreement's "contacts" with the forum.

The Pennsylvania Superior Court exercised jurisdiction over Petitioner in such a manner so as to satisfy the Due Process Clause; therefore, this Court must decline to issue a writ of certiorari to the lower court.

II. The Pennsylvania Superior Court's Decision Does Not Conflict With or Create Confusion Among the Decisions of the Federal Courts of Appeals.

The Pennsylvania Superior Court decision is *consistent* with the decisions of the Federal Courts of Appeals.

In *Williams v. Bowman Livestock Equipment Company*, 927 F.2d 1128 (10th Cir. 1991), the Tenth Circuit Court of Appeals *expressly adopted* the holding of the Pennsylvania Superior Court, finding that a corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor. *Id.* at 1132 *citing, City of Richmond v. Madison Management Group*, 918 F.2d 438, 454 (4th Cir. 1990). The court in *Williams* declined to exercise personal jurisdiction over the non-resident defendant *only* because application of Oklahoma law would not impose successor liability under the facts of that case.

In *City of Richmond v. Madison Management Group, supra*, the United States Court of Appeals for the Fourth Circuit also expressly adopted the Pennsylvania Superior Court's holding and cited the Superior Court for the proposition that *"the great weight of persuasive authority permits imputation of a predecessor's actions upon its successor whenever forum law would hold the successor liable for its predecessor's actions."* *Id.* at 454 [emphasis supplied]; Pet. App. at A-14.

The court in *City of Richmond* noted that "the wholesomeness of that rule is apparent on its face. Every corporation who puts out a lousy product like was done here would avoid all consequences of it by just reforming in

some other jurisdiction and avoiding any accountability on it." *Id.* at 455.

Similarly, in *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988), the court declined to exercise personal jurisdiction only because the court found that the "successor" corporation had purchased certain assets from the predecessor but did not assume any liabilities. As stated above, here Petitioner voluntarily assumed liability for the injuries caused by its predecessor's forum related activity.

Because the Pennsylvania Superior Court's decision does not conflict with the decisions of the Federal Courts of Appeal, Petitioner's Writ of Certiorari should be denied.

III. A Writ of Certiorari should be Denied with Reference to the Full Faith and Credit Clause Issue Where Petitioner Did Not Press the Issue and the Pennsylvania Superior Court Did Not Decide the Issue

This Court should decline to issue a writ of certiorari to the Pennsylvania Superior Court with reference to the Full Faith and Credit Clause issue presented because Petitioner did not press the issue in the lower court, nor did the court address or decide the issue. Indeed, the *only* reference to the argument Petitioner advances here is found in a single footnote in Petitioner's brief to the Superior Court.

Although this Court possesses the discretion to entertain issues not pressed or passed upon in the lower court, *Vachon v. New Hampshire*, 414 U.S. 478, 479 n. 3 (1974),

"due regard for the appropriate relationship of this Court to state courts, demands that those courts be given an opportunity to consider the constitutionality of [the issue presented]". *Illinois v. Gates*, 462 U.S. 213, 221 (1983) citing, *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). *See also, Perry v. Thomas*, 482 U.S. 483, 492 (1987) (Court refused to consider several issues because court below did not address or decide issues presented).

Therefore, this Court should decline to issue a writ of certiorari to the Superior Court of Pennsylvania because the Superior Court has not had the opportunity to address or decide the Full Faith and Credit Clause issue Petitioner presents here.

IV. A Writ of Certiorari Should Be Denied With Reference to the Full Faith and Credit Clause Issue Where the Pennsylvania Superior Court Decision is in Accord With Current Substantive Delaware Law and There is No Judicial Authority to Support Application of the Full Faith and Credit Clause to the Factual Context of This Matter

Petitioner asserts that the Superior Court's reliance on a *de facto* merger theory of successor liability fails to give force to the Full Faith and Credit Clause of the United States Constitution, U.S. Const. Art. IV § 1. Petitioner cites *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), *Sovereign Corp. v. Bolin*, 305 U.S. 66 (1938) and *Canada Southern R.R. Co. v. Gebhard*, 109 U.S. 527 (1883) for the untenable proposition that adherence to the Delaware statutory scheme "discharges it from liability . . . everywhere". Petitioner's Brief at p. 10 *citing*,

Canada Southern R.R. Co. v. Gebhard, 109 U.S. at 538. Petitioner's rather disingenuous argument completely ignores the subject matter, narrowness and limited application of the very cases it cites.

All of the decisions of this Court cited by Petitioner deal with fraternal society benefit contracts and the enforceability of limitation periods set forth therein. As Justice Roberts noted in *Sovereign v. Bolin, supra*, 305 U.S. at 75:

> Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation.

Here, Respondent is not a party to *any* agreement with Petitioner regarding the rights, obligations and liabilities between the parties. Indeed, the Pennsylvania Superior Court decision to apply the substantive law of Pennsylvania to the issue of successor liability falls squarely *within* the policy of this Court with reference to application of the Full Faith and Credit Clause. *Accord, Pink v. A.A.A. Highway Express*, 314 U.S. 201, 211 (1941), *reh'g denied*, 314 U.S. 716 (1942) (recognizing and allowing state to interpret legal effect of insurance policy upon residents where residents may defend on the ground that they were never stockholders of insolvent mutual insurance company). Moreover, the Delaware statutory scheme which Petitioner seeks to apply to this case contemplates purely contractual relationships. The subject matter of this action sounds in tort, not contract. As this Court noted in *Pink v. A.A.A.*:

> Like, but more cogent, reasons may call for the restriction of the full faith and credit clause as the instrument for controlling the law and policy of one state, with respect to its domestic affairs, by the *statutory* command of another.

Id. at 211 [emphasis supplied]. *Accord, Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 493, 502-505 (1939) (in workers compensation action, *state of place of injury* free to apply its own law to exclusion of law of state of employer and employee); *Alaska Packing Association v. Industrial Accident Commission*, 294 U.S. 532, 544-550 (1935) (in workers compensation action, *state of employer and employee* free to apply its own law to injury rather than law of state where injury occurred).

As demonstrated above, the Full Faith and Credit Clause does not *require* a state to substitute for its own law the conflicting law of another state, especially where, as here, the cause of action sounds in tort, not contract. "[T]he philosophy of the Pennsylvania Courts [is] that questions of an injured party's rights to seek recovery are to be resolved by an analysis of public policy considerations rather than by mere procrustean application of formalities". *Knapp v. North American Rockwell*, 506 F.2d 361, 369 (3rd Cir. 1974), *cert. denied*, 421 U.S. 965 (1975). Petitioner has advanced no authority for application of the Full Faith and Credit Clause here.

Even if this Court were to accept and apply Petitioner's strained interpretation of the Full Faith and Credit Clause to the facts of this matter, the Delaware state court decisions cited by Petitioner for the proposition that Delaware courts would refuse to consider the

subject transaction as a *de facto* merger are not controlling. Subsequent Delaware case law has brought Delaware in line with modern principles of successor liability law. *Sheppard, et al. v. A.C. & S. Co., Inc., et al.*, 484 A.2d 521, 524-525 (Del. Sup. Ct. 1984), *appeal denied sub nom., In Re: Asbestos Litigation*, 497 A.2d 783 (1985). *See also, Bouley v. American Cyanamid, et al.*, 85-4368-Z, Slip Op., 1987 WESTLAW 18738 (D. Mass. Oct. 21, 1987); (specifically rejecting the argument Petitioner advances here, and acknowledging that *Hariton v. Arco Electronics, Inc.*, 41 Del. Ch. 74, 188 A.2d 123 (1963) and *Heilbrunn v. Sun Chemical Corp.*, 38 Del. Ch. 321, 150 A.2d 755 (1959) do not lend support to Petitioner's argument because "more recent Delaware cases have recognized that Delaware law accords with recognized principles of successor liability law").

For all of the foregoing reasons, this Court should deny to issue a writ of certiorari to the Pennsylvania Superior Court with reference to the Full Faith and Credit Clause issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Superior Court of Pennsylvania should be denied.

Respectfully submitted,

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